Supreme Court, U.S.
FILED
99 796 NOV - 4 1999
OFFICE OF THE CLERK

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1999

LOCKHEED MARTIN IMS and
EDWARD AVILA,
Cross-Petitioner,

vs.

RONALD BRANSON,
Cross-Respondent.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

PATRICK MCADAM
Counsel of Record
Iverson, Yoakum, Papiano & Hatch
624 South Grand Avenue
Suite 2700
Los Angeles, California 90017
(213) 624-7444
Attorneys for Cross-Petitioner Lockheed Martin IMS and Edward Avila

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

1788

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

QUESTION PRESENTED

Upon a finding that the plaintiff's action under 42 U.S.C. § 1983 was frivolous, may a defendant recover attorney's fees under 42 U.S.C. § 1988 even though plaintiff's action was dismissed for lack of subject matter jurisdiction?

LIST OF PARTIES

Appellant:	Ronald Branson
Appellees:	City of Los Angeles, Los Angeles Department of Transportation (LADOT); Thomas Conner, General Manager LADOT; Lockheed Martin IMS; Edward Avila, Western Region Senior Vice President of Lockheed Martin IMS; California Department of Motor Vehicles (DMV); Sally Reid, Director DMV
Cross-Appellants:	Lockheed Martin IMS and Edward Avila
Cross-Appellee:	Ronald Branson

LIST OF PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

Lockheed Martin IMS is a New York corporation that is a wholly owned subsidiary of its parent company, Lockheed Martin Corporation. Lockheed Martin IMS has no subsidiaries. There is no other parent or subsidiary company to be listed.

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No. 99-585

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1999

RONALD BRANSON,
Petitioner,

vs.

CITY OF LOS ANGELES, et al.,
Respondents.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Lockheed Martin IMS and Edward Avila ("Avila") conditionally cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS

The court of appeal's opinion was not officially published.[1] Moreover, to our knowledge, the decision has not as yet been cited in the official "listing of decisions without published opinions." The citation of an unofficial report of the opinion is: 1999 U.S. App. LEXIS 13512.

There are no official or unofficial citations for the district court's order at-issue here.

JURISDICTION

The court of appeals entered its judgment on June 17, 1999.[2] On July 22, 1999 the court of appeals entered its order denying Ronald Branson's ("Branson") request for a rehearing.[3] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1988(b) ("§ 1988") provides, in relevant part, that "(i)n any action or proceeding to enforce a provision of (section) . . . 1983 . . . of this title . . ., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . ."

42 U.S.C. § 1983 ("§ 1988") provides, in relevant part, that "[e]very person who under color of any statute . . . of any State . . ., subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights

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[1] Appendix A-1.

[2] Appendix A-1.

[3] Appendix A-5.

. . . secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

STATEMENT OF CASE

After Branson filed this federal action under § 1983, naming Lockheed Martin IMS and Avila as two of the defendants, motions to dismiss were filed, granted, and judgment was entered against Branson.[4]

Lockheed Martin IMS and Avila then filed a motion for § 1988 attorney's fees, which was denied.[5] They timely cross-appealed that ruling.

Even though the court of appeals affirmed the district court's finding that Branson's lawsuit was frivolous, the court of appeals concluded that the district court properly denied Lockheed Martin IMS's and Avila's request for § 1988 attorney's fees.[6]

REASONS FOR GRANTING CROSS-PETITION

This Court has ruled that, as protection from frivolous lawsuits, Congress permits an award of fees to civil rights defendants. *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 418-421, 54 L.Ed.2d 648, 654-657, 98 S.Ct. 694, 699-700 (1978) (civil rights defendant recovers fees "upon a finding that the plaintiff's action was frivolous"); *Hughes v. Rowe,* 449 U.S. 5, 14-16, 66 L.Ed.2d 163, 172, 173, 101 S.Ct. 173, 178-179 (1980) (*Christiansburg* standard applies to prevailing defendants under § 1988.). More specifically, "[i]t cannot be lightly assumed that . . . . Congress intended

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[4] Appendix A-6.

[5] Appendix A-8.

[6] Appendix A-3, A-4.

to distort (the adversary process) by giving the private plaintiff substantial incentives to sue, while foreclosing to the defendant the possibility of recovering his expenses in resisting even a groundless action . . . ." *Christiansburg, supra.,* 434 U.S. at 419. Further, the taproot for the decision by the court of appeals is an Eastern District of Pennsylvania case that relied on a test, for determining a prevailing party under § 1988, that was rejected by this Court in *Texas Teachers v. Garland School Dist.,* 489 U.S. 782, 790-791, 103 L.Ed.2d 866, 876-877, 109 S.Ct. 1486 (1989) ("We think it clear that the 'central issue' test applied by the lower courts here is directly contrary to the thrust of our decision in Hensley. Nor does the central issue test have much to recommend it from the viewpoint of judicial administration of section 1988 . . . .").[7]

Accordingly, the question presented by this cross-petition was decided by the court of appeals in a way that conflicts with previous decisions of this Court.

The decision of the court of appeals also conflicts with the decisions of other United States courts of appeal. See *Tonti v. Petropoulous,* 656 F.2d 212, 216, 217 (6th Cir. 1981) (§ 1988 fee award to defendant after dismissal for lack of subject matter jurisdiction because plaintiff raised arguments that had already been rejected by state appellate court); *Werch v. City of Berlin,* 673 F.2d 192, 195-196 (7th

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[7] *Sellers v. Local 1598, Dist. Council 88,* 614 F.Supp. 141, 144 (D. C. Pa. 1985) held that ". . . . when a complaint is dismissed for lack of jurisdiction, the defendant cannot be a 'prevailing party.' Defendant has not 'prevailed' over the plaintiff on any issue central to the merits of the litigation . . . ." This is the "taproot" because *Keene Corp. v. Cass,* 908 F.2d 293, 298 (8th Cir. 1990) relied on *Sellers; Branson v. Nott,* 62 F.3d 287, 293 (9th Cir. 1995) relied on *Keene Corp.;* and, here, the court of appeals relied on *Branson v. Nott.* Although *W.G. v. Senatore,* 18 F.3d 60 (2nd Cir. 1994), was also cited by *Branson v. Nott,* the Second Circuit cited *Keene Corp. Id.* 18 F.3d at 64.

Cir. 1982) (§ 1988 fee award to defendant after dismissal for lack of subject matter jurisdiction because plaintiff should have known jurisdiction was absent); and *Elks Nat. Found. v. Weber,* 942 F.2d 1480, 1483, 1485 (9th Cir. 1991) (affirmed award of § 1988 attorney's fees after complaint dismissed for lack of subject matter jurisdiction).

In sum, the authorities are in conflict on a matter of importance to the courts and the public. Moreover, this case presents a timely opportunity for this Court to address the disputed issue and to bring certainty and uniformity to the area of a civil rights defendant's eligibility to use § 1988 to recover attorney's fees.

CONCLUSION

The cross-petition for a writ of certiorari should be granted.

DATED: October 28, 1999

Respectfully submitted,

PATRICK McADAM
Counsel of Record
Iverson, Yoakum, Papiano & Hatch
624 South Grand, 27th Floor
Los Angeles, California 90017
Counsel for Conditional
Cross-Petitioners
LOCKHEED MARTIN IMS
and AVILA

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Nos. 98-56530, 98-56685

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RONALD BRANSON,
Plaintiff-Appellant-Cross-Appellee,
v.
CITY OF LOS ANGELES; LOS ANGELES DEPARTMENT OF TRANSPORTATION (LADOT);
THOMAS CONNER, General Manager LADOT;
CALIFORNIA DEPARTMENT OF MOTOR VEHICLES;
SALLY REID, Director DMV
Defendants/Appellees,
and
LOCKHEED MARTIN IMS CORPORATION, (LIMSC);
EDWARD AVILA, Western Region Senior Vice President (LIMSC)
Defendants-Appellees-Cross-Appellants.

Filed June 17, 1999, Cathy A. Catterson,
Clerk, U.S. Court of Appeals

Appeals from the United States District Court
for the Central District of California
TERRY J. HATTER, Chief Judge, Presiding

D.C. No. CV-98-00778-TJH

MEMORANDUM[1]

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Submitted June 14, 1999[2]

Before: O'SCANNLAIN, RYMER, and SILVERMAN, Circuit Judges.

Ronald Branson appeals pro se from the district court's dismissal of his 42 U.S.C. § 1983 action, its denial of his motion to alter or amend the judgment and for leave to amend, and its imposition of sanctions and costs against him. Lockheed Martin IMS Corporation and Edward Avila cross-appeal from the district court's denial of their request for attorney's fees pursuant to 42 U.S.C. § 1988. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm both the appeal and cross-appeal.

We may affirm the district court's decision on any basis which the record supports. *See Branson v. Nott,* 62 F.3d 287,291 (9th Cir. 1995). Because Branson's action is an impermissible collateral attack against a prior state court judgment, the district court lacked subject matter jurisdiction and properly dismissed his section 1983 action. *See id.* at 291-92.

Because the record shows no newly-discovered evidence, clear error or manifest injustice, or an intervening change in controlling law, the district court properly denied Branson's Fed. R. Civ. P.59(e) motion. *See School Dist. No. 1J, Multnomah County v. ACandS, Inc.,* 5 F.3d 1255, 1262-63 (9th Cir. 1993). Moreover, the district court did not err by denying Branson leave to amend his complaint because amendment would be futile given the district court's lack of subject matter jurisdiction. *See Cahill v. Liberty Mut. Ins. Co.,* 80 F.3d 336, 339 (9th Cir. 1996).

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[2] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App.P.34(a)(2). Accordingly, Lockheed's and Avila's request for oral argument is denied.

We further conclude that the district court did not err by taxing costs against Branson because 28 U.S.C. § 1919 authorizes payment of just costs in an action dismissed for lack of jurisdiction. *See Branson,* 62 F.3d at 293 n.10. Moreover, because the record indicates that Branson's action was a frivolous and impermissible collateral attack against a prior state court judgment, the district court properly imposed sanctions sua sponte against Branson. *See* Fed. R. Civ. P. 11.

We deny California Department of Motor Vehicles' and Reid's request for attorney's fees and costs without prejudice to their requesting such an award of fees and costs in a separately filed motion. *See Gabor v. Frazier,* 78 F.3d 459, 459-60 (9th Cir. 1996) (order).

We deny Branson's requests for judicial notice, striking of portions of certain briefs, and sanctions.[3]

Finally, as to Lockheed's and Avila's cross-appeal, we conclude that the district court properly denied their request for attorney's fees under 42 U.S.C. § 1988 because there is no prevailing party in an action dismissed for lack of subject matter jurisdiction. *See Branson,* 62 F.3d at 293.[4]

Branson shall pay costs on his appeal. Lockheed and Avila shall pay costs on their cross-appeal.

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[3]Branson's remaining contentions lack merit.

[4]Lockheed and Avila contend that *Elks Nat'l. Found. v. Weber,* 942 F.2d 1480, 1485 (9th Cir. 1991), permits the award of attorney's fees under 42 U.S.C. § 1988 when an action is dismissed for lack of subject matter jurisdiction. This court in *Branson* distinguished *Elks National Foundation* because in the latter case the award of attorney's fees was based alternatively on Fed. R. Civ. P. 11, which permits the award of attorney's fees when an action is dismissed for lack of subject matter jurisdiction. *See Branson,* 62 F.3d at 293. Here, no Fed. R. Civ. P. 11 motion was filed, so the district court had no basis to award Lockheed and Avila attorney's fees.

No. 98-56530 (Main Appeal) AFFIRMED.

No. 98-56685 (Cross-Appeal) AFFIRMED.

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST
OCT 7, 1999

by:

Deputy Clerk

NOS. 98-56530, 98-56685

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RONALD BRANSON,
Plaintiff-Appellant-Cross-Appellee,
v.
CITY OF LOS ANGELES; LOS ANGELES DEPARTMENT OF TRANSPORTATION (LADOT);
THOMAS CONNER, General Manager LADOT;
CALIFORNIA DEPARTMENT OF MOTOR VEHICLES;
SALLY REID, Director DMV,
Defendants-Appellees,
and
LOCKHEED MARTIN IMS CORPORATION., (LIMSC);
EDWARD AVILA, Western Region Senior Vice President (LIMSC),
Defendants-Appellees-Cross-Appellants.

Filed July 22, 1999
Cathy A. Catterson, Clerk
U.S. Court of Appeals

DC# CV-98-00778-TJH
Central California
(Los Angeles)

ORDER

Before: O'SCANNLAIN, RYMER, and SILVERMAN, Circuit Judges

The panel has voted to deny appellant's petition for panel rehearing.

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

RONALD BRANSON,
Plaintiff.
v.
CITY OF LOS ANGELES, *et al.*,
Defendants.

FILED
CLERK, U.S. DISTRICT COURT
MAY 12, 1998
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

ENTERED
CLERK, U.S. DISTRICT COURT
MAY 14, 1998
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

CV 98-0778 TJH (AJWx)

ORDER

The Court has considered the motions of the City of Los Angeles, Los Angeles Department of Transportation, Thomas Connor, Lockheed Martin IMS Corporation, Edward Avila, California Department of Motor Vehicles, and Sally Reid to dismiss, together with moving and opposing papers.

It is Ordered that the motions to dismiss be, and hereby are, Granted with prejudice.

Date: May 7, 1998

TERRY J. HATTER, JR.

TERRY J. HATTER, JR.
Chief United States
District Judge

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

RONALD BRANSON,

Plaintiff,

v.

CITY OF LOS ANGELES, *et al.*,

Defendants.

FILED
CLERK, U.S. DISTRICT COURT
AUG. 6, 1998
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

ENTERED
CLERK, U.S. DISTRICT COURT
AUG. 10, 1998
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY
CV 98-778 TJH (AJWx)

ORDER

The Court has considered Plaintiff's motion to alter or amend judgment, Plaintiff's request to file a first amended complaint, Defendant Lockheed Martin IMS Corp.'s motion for attorney's fees, and Plaintiff's motion to take Defendant Lockheed Martin IMS Corp.'s motion for attorney's fees off calendar, together with the respective moving and opposing papers.

It is Ordered that Plaintiff's motion to alter or amend judgment be, and hereby is, Denied.

It is further Ordered that Plaintiff's request for leave to file a first amended complaint be, and hereby is, Denied.

It is further Ordered that Plaintiff's motion to take Defendant Lockheed Martin IMS Corp.'s motion for attorney's fees off calendar be, and hereby is, Denied.

It is further Ordered that Defendant Lockheed Martin IMS Corp.'s motion for attorney's fees be, and hereby is, Denied.

It is further Ordered, *sua sponte*, that Plaintiff be sanctioned in the amount of $1,000.00 for filing this frivolous action, and Plaintiff shall pay the sanction to the Clerk of the Court on or before September 21, 1998.

Date: August 5, 1998.

TERRY J. HATTER, JR.

Terry J. Hatter, Jr.
Chief United States District Judge

99-796

Docket No. ~~99-585~~

Supreme Court, U.S.
FILED
DEC 7 1999
OFFICE OF THE CLERK

THE SUPREME COURT OF THE UNITED STATES

LOCKHEED MARTIN IMS CORPORATION and EDWARD AVILA,

Cross-Petitioners,

v.

RONALD BRANSON,

Cross-Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

RONALD BRANSON
Cross-Respondent, Pro Se
16623 Calahan St.
North Hills CA 91343
(818) 875-4231

December 6, 1999

CROSS-RESPONDENT'S OPPOSITION TO CONDITIONAL CROSS-PETITION

Statement of the Case

The question of attorney's fees, costs, or other sanctions cannot be reached until the threshold question of whether the judgment is supported by the record (presented as Question 2 in the Petition) is decided. Everything stated in the Cross-Petition is moot pending a determination and showing that the judgment is valid and supported by evidence in the record. Cross-petitioners did not address that question in their respondents' brief.

Argument

The question specifically is whether respondents/ cross-petitioners Lockheed and Avila may recover attorney's fees under 42 USC §1988, upon a finding that petitioner's/cross-respondent's (plaintiff) action under 42 USC §1983 was frivolous, even though the action was dismissed for lack of subject matter jurisdiction.

The two premises in that question are: (1) upon a finding that the action was frivolous; and (2) the action was dismissed for lack of subject matter jurisdiction.

1. ***A finding that the action was frivolous.***

This argument is presented under Argument 3-C at pages 10-12 of the Petition. The district court, on the issue of "frivolous action", stated merely: "It is further Ordered, *sua sponte,* that Plaintiff be

sanctioned in the amount of $1,000.00 for filing this frivolous action...." **[Petn. A-7]**. No evidence is shown supporting such "finding." See pages 11-12 of the Petition herein. If the basis for the sanction is Rule 11 FRCiv.P, as the court of appeals indicates, please note that the court's responsibilities under that Rule were not followed. **[Petn. pp 11-12]**.

On the "frivolous action" issue, the court of appeals stated:

> "[B]ecause the record indicates that Branson's action was a frivolous and impermissible collateral attack against a prior state court judgment, the district court properly imposed sanctions sua sponte against Branson. See Fed.R. Civ.P. 11. **[Petn pp 10-11; Petn A-3]**

However, the court of appeals failed to show where "the record indicates that [the] action was a frivolous and impermissible collateral attack against a prior state court judgment..." This issue is raised in the petition as Question 2 "Whether the judgment is supported by the record." Cross-petitioners Lockheed and Avila did not respond to that question in their respondents' brief. Petitioner stands on his statement on page 11 of the petition, to wit:

> As shown in Argument 2..., it is impossible for petitioner to have attacked a prior state court judgment according to the evidence on record in this case.

2. ***The action was dismissed for lack of subject matter jurisdiction.***

As shown above, the court of appeals attributes that dismissal to its unsupported contention, to wit:

> [B]ecause the record indicates that Branson's action was a frivolous and impermissible collateral attack against a prior state court judgment.... **[Petn A-3]**

This entire case rests upon that contention by the court of appeals, and unless and until citation of evidence from the record is made, showing that the record *does indeed support* that contention, and the court's judgment of June 17, 1999 generally **[Petn A-1 thru A-4]**, the question of attorney's fees cannot be reached.

As cross-respondent stated in the petition:

> As this case stands right now, sanctions [*including attorney's fees -RB*] and costs against petitioner are not justified under law; a currently pending post-judgment motion for Rule 38 FRAP sanctions may shed future light on this issue. Petitioner reserves his right to file a supplemental brief... upon receiving a decision on that motion. **[Petn pp 12-13]**

A decision has been received on the Rule 38 motion wherein the court of appeals has awarded attorney's fees and double costs against petitioner, *still refusing* to cite evidence from the record in support of its judgment upon which these sanctions rely. The court once again refused mandatory

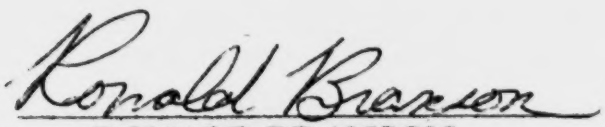
judicial notice of the evidence supplied by petitioner necessary to cite the portion(s) of the record in support of the judgment.

A supplemental brief is forthcoming.

Conclusion

Cross-respondent specifically seeks a determination and showing by evidence from the record that the judgment of June 17, 1999, is a valid judgment.

Dated: December 6, 1999



RONALD BRANSON
Cross-respondent, Pro Se
16623 Calahan Street
North Hills CA 91343
(818) 875-4231